I. INTRODUCTION TO LUST TRUST FUND COST RECOVERY

The primary purpose of LUST Trust Fund Cost recovery is to provide incentive for owners and operators to comply with the technical and financial responsibility requirements and to clean up releases from their underground storage tanks.

According to the *LUST Cost Recovery Policy*, the primary purpose of cost recovery under Subtitle I of the Resources Conservation and Recovery Act (RCRA) is to provide incentives for owners and operators to comply with technical and financial responsibility requirements, and most importantly, to clean up releases from their own tanks. The *LUST Cost Recovery Policy* provides states with the autonomy and incentive to pursue recoveries aggressively and efficiently. It allows authorized states to litigate and settle recovery claims without routine involvement or concurrence of EPA or the Department of Justice. States may retain any LUST Trust Fund monies they recover for use on additional Trust Fund-eligible cleanups and activities.

II. PURPOSE OF THIS GUIDANCE

o List Minimum Criteria
o Aid Region 4 Review
o Address OIG Concerns

The purposes of this guidance are to provide EPA Region 4 states with *minimum* criteria to develop and implement federal cost recovery programs in accordance with the requirements of the RCRA Subtitle I; to aid EPA Region 4's review of state cost recovery programs; and to address the concerns of the Office of Inspector General (OIG) as expressed by the Office of Underground Storage Tanks (OUST) memorandum dated December 31, 1996. This guidance also serves to summarize and consolidate information published on the Leaking Underground

Storage Tank (LUST) Trust Fund cost recovery programs over the past several years.

III. REFERENCES

The following references were used in assimilating this guidance. The references are listed herein so states may obtain the documents and refer to them in the development and implementation of their cost recovery programs. Also, this section provides a comprehensive list of what has been published on LUST Trust Fund cost recovery.

References Include:
o RCRA
o 40 CFR Part 31
o Financial Mgmt. Handboook
o OSWER Directives
o Guidance Memorandums
o Guidance Letters
o OIG Reports

" Subtitle I of the Resource Conservation and Recovery Act, as amended (hereinafter *RCRA*),

" 40 CFR Part 31 Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, effective October 1, 1988 (hereinafter *Grants Regulations* or *40 CFR Part 31*),

" LUST Trust Fund State Financial Management Handbook, EPA, March 1989 (hereinafter *Financial Management Handbook*),

" Office of Solid Waste and Emergency Response (OSWER) Directive 9650.10A, LUST Trust Fund Cooperative Agreement Guidelines, EPA, May 1994 (hereinafter *LUST Trust Fund Guidelines*),

" OSWER Directive 9610.10A, Cost Recovery Policy, EPA, May 1994 (hereinafter *LUST Cost Recovery*

Policy),

" Memorandum from Lisa Lund, Acting Director of Office of Underground Storage Tanks (OUST) dated November 8, 1994, subject LUST Trust Fund Cost Recovery Policy (hereinafter *1994 OUST memorandum*),

" Memorandum from Joshua Baylson, Acting Director of OUST dated December 31, 1996, subject LUST Trust Fund Cost Recovery Policy (hereinafter *1996 OUST memorandum*),

" Region 4 Attorneys Workgroup Guidance on Cost Recovery, EPA, June 1995 (hereinafter *Attorney's Workgroup Guidance*),

" Letter from John Mason, EPA UST Section Chief, to Michael Cleary, North Carolina Federal Trust Unit, dated October 18, 1996, subject LUST Trust Fund cost recovery protocol (hereinafter *1996 Region 4 letter*),

" Consolidated Report on EPA's LUST Program, Office of Inspector General (OIG) Audit Report No. E1LLF5-10-0021-6100264, August 6, 1996 (hereinafter *OIG Report*), and

o Memorandum from John Heffelfinger, OUST, to Maryann Gerber, dated July 1, 1997, subject LUST Trust Fund cost Recovery Issues (hereinafter *1997 OUST memorandum*).

IV. DEFINITIONS

The definitions used throughout this guidance document are the same as in the UST Technical Requirements at 40 CFR Part 280, except as indicated below:

"**Compromise**" as used in this guidance, means accepting less than the full value of the cost recovery claim.

"**Exposure Assessment**" as used in this guidance, means an assessment to determine the extent of exposure of, or potential for exposure of, individuals to petroleum from a release from an underground storage tank based on such factors as the nature and extent of contamination and the existence of or potential for pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size of the community within the likely pathways of exposure, and the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified contaminants and any available recommended exposure or tolerance limits for such contaminants. Such assessment shall not delay corrective action to abate immediate hazards or reduce exposure. [Definition from RCRA section 9003(h)(6)(10)]

Although not specifically stated in the above definition from RCRA section 9003(h)(10), an exposure assessment could include determination of the nature and extent of contamination of soils and address dermal, inhalation and ingestion exposure pathways.

"**Facility**" for the purposes of cost recovery, means with respect to any owner or operator, all underground storage tanks used for the storage of petroleum which are owned or operated by such owner or operator and are located on a single parcel of property (or on any contiguous or adjacent property). [Definition from RCRA section 9003(h)(6)(D)]

"**Owner**" as used in this guidance, does not include any person who, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the owner's security interest in the tank. [Definition from RCRA section 9003(h)(9)]

"**Termination**" as used in this guidance, means forgoing any cost recovery whatsoever.

V. AUTHORITY FOR COST RECOVERY

RCRA § 9003(h)(6) PROVIDES COST RECOVERY AUTHORITY

The authority to operate a federal cost recovery program for petroleum USTs is provided by section 9003(h)(6) of RCRA. Section 9003(h)(6) provides the authority for EPA, and *authorized states*, to pursue cost recovery whenever costs have been incurred by the Administrator (or authorized state) for undertaking corrective action or enforcement action with respect to the release of petroleum from an underground storage tank (i.e., when LUST Trust Funds have been expended). The owner and operator of such tanks shall be liable to the Administrator, or authorized state, for such costs. The types of corrective action and enforcement activities eligible for LUST Trust Fund expenditures are described in section VI.B.(4) of this guidance.

A state may exercise the authorities of the federal cost recovery program under RCRA section 9003(h)(6), subject to the terms of section 9003(h), and if the Administrator determines the State has the capabilities to carry out effective corrective actions and enforcement activities; and, the Administrator enters into a cooperative agreement with the State setting out the actions to be undertaken by the State.

VI. REQUIREMENTS FOR A LUST COST RECOVERY PROGRAM

COST RECOVERY PROGRAMS MUST HAVE:

o State Authority
o Written Policy or Procedures
o Site-Specific Accounting
o Documentation of Decisions

All states receiving LUST Trust Funds through a cooperative agreement award must develop a cost recovery program consistent with the *LUST Cost Recovery Policy* (*see 1996 OUST memorandum*). Based on the review of the reference material, Region 4 believes certain items must be included in a state cost recovery program. The level of detail on these items will vary state-by-state based on the individual state needs. Each item is described in more detail in section VII of this guidance. The items that should be included in the state cost recovery programs are:

- State Cost Recovery Authority
- Written Policy or Procedures
  - Purpose of Cost Recovery
  - Definitions
  - Site Prioritization Method
  - Allowable Costs
  - Recoverable Costs
  - Minimum recovery Effort
  - Recovery Where Financial Responsibility was not Maintained
  - Priorities for Cost Recovery
- Recovery Procedures
- Site-Specific Accounting and Record-keeping Capability
- Documentation of Site-Specific Decisions

VII. DETAILS OF REQUIREMENTS

The following paragraphs provide more information on the required items listed above. Region 4 anticipates some description of each of the major items in this section (A, B, C, D, and E) in each state cost recovery program.

A. State Cost Recovery Authority

> ***STATE AUTHORITY MUST INCLUDE:***
>
> ***o Attorney General Certification***
> ***o Capability to carry out Corrective Action and Enforcement***
> ***o LUST Trust Fund Cooperative Agreement***

Under *RCRA*, states may be authorized to exercise the authorities of the federal cost recovery program, subject to certain conditions. A state must have the authority to recover LUST Trust Fund expenditures made under its cooperative agreement with EPA. States must either have the state authority to recover these expenditures, or certify that state law permits it to exercise the cost recovery authorities in RCRA section 9003(h)(6). This issue is described fully on pages 1-3 of the Special Condition section of the *LUST Cost Recovery Policy*.

Region 4 states met this requirement in 1987-88 by providing Region 4 with a letter or memorandum from the State Attorney General and by accepting a LUST Trust Fund cooperative agreement with the special conditions for cost recovery. The Attorney General letter provided certification of the state’s authority to perform cost recovery and the capability to carry out effective corrective actions and enforcement activities. The LUST Trust Fund cooperative agreement sets out the action the state will undertake including cost recovery.

A copy of the Attorney General certification should be included in the state cost recovery program. Region 4 encourages states to revisit the Attorney General letters since they are dated and state authorities may have changed over the past several years.

If your state does not have prior certification, the following items are required: (1) certification (a letter from the State Attorney General) that the state can use the federal cost recovery authority or a state authority (include a copy of the state authority) to perform cost recovery for LUST Trust Funds; (2) the Administrator's determination that the state has the capability to carry out effective corrective action and enforcement activities; and (3) a LUST Trust Fund cooperative agreement that sets out the actions to be undertaken by the state under RCRA Subtitle I.

o JUDICIAL ACTIONS MAY BE FILED IN STATE COURT
o NOTIFY REGION 4 ATTORNEY ONE WEEK PRIOR TO FILING

The *LUST Cost Recovery Policy* discusses in which court judicial actions should be filed (state or federal). A final decision has not been made on this point. The practice of bringing LUST Trust Fund cost recovery actions in state court has not been questioned by Office of General Counsel (OGC), Office of Enforcement and Compliance Assurance (OECA), or the Office of Inspector General (OIG). Therefore, EPA sees no reason to change this practice at this time.

According to the *Cost Recovery Policy,* page 4, the state must notify EPA’s Office of Regional Counsel within one week of filing judicial recovery actions for sites where they have used LUST Trust Fund money for cleanup or enforcement. The purpose of the notification is to ensure cases filed strictly under the *RCRA Subtitle I* authority receive proper federal assistance and to determine if EPA cases against the same party, but perhaps under different programs, are not unduly effected. For Region 4 the person to notify is:

Mr. Kevin Smith
Associate Regional Counsel
Environmental Accountability Division
U. S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

B. Written Policy or Procedures

The state must have a written cost recovery policy or procedures that are consistent with the *LUST Cost Recovery Policy.* The OIG did not express concerns with the provisions of EPA's *LUST Cost Recovery Policy*, but rather identified situations where a state had no policy, was not implementing the policy they had, or was not documenting the decisions reached under their policy. The following are components identified in the references for LUST Trust Fund cost recovery for inclusion in a written state cost recovery policy or procedures.

POLICIES MUST HAVE: *Purpose consistent with EPA LUST Trust Fund Policy*

(1) Purpose of Cost Recovery. The state should briefly describe the purpose of its cost recovery policy or procedures consistent with the purposes listed in the *LUST Cost Recovery Policy* (i.e., to provide incentives and induce cleanup of contaminated sites by owner and operators). Several comments from the *OIG Report* on the LUST Trust Fund Program focused on the fact that some states implemented cost recovery inconsistently with EPA's stated purposes or not at all. Therefore, it is important that the written state cost recovery policy or procedures

clearly state the purpose(s) of the program consistent with the listed federal purposes in the *LUST Cost Recovery Policy*.

(2) Definitions. Since definitions help ensure that all policy users have a clear and consistent understanding of the program, it is important that the state's cost recovery policy or procedures refer to applicable definitions in state statutes and regulations as needed. Definitions also help define the scope of the program and how it will apply. *RCRA sections 9003(h)(6)(D), (h)(9) and (h)(10)* provide definitions specific to LUST Trust Fund cost recovery that may not exist in state regulations. These definitions should be added if applicable and not already referenced. Also, the *LUST Cost Recovery Policy* provides definitions for the terms "compromise" and "termination" as they apply to LUST Trust Fund cost recovery. These definitions should be incorporated if applicable to the state's cost recovery policy or procedures.

POLICIES MUST HAVE: ***Written method for prioritizing sites according to risk.***

(3) Site Prioritization Method. A written method, or reference to a written method, for prioritizing sites for LUST Trust Fund corrective actions should be a part of the state cost recovery policy or procedures. The prioritization method should be consistent with the requirements at *RCRA section 9003(h)(3)*.

The *OIG Report* on the LUST Trust Fund program pointed out that sites undergoing corrective action or enforcement with LUST Trust Funds must be prioritized in accordance with the risk to human health and the environment pursuant to *RCRA section 9003(h)(3)*. The *OIG Report* also found that even when states had priority ranking systems, LUST Trust Funds were not being spent on the highest priority sites first. Initially, the OIG maintained that LUST Trust Funds should only be spent on high priority sites. After discussion with OUST on this issue, the *OIG Report* concluded that while the primary effort (and funds) should be placed on high priority sites, lower priority sites could receive some level of effort using LUST Trust Funds.

Therefore, it is expected that all state cost recovery policy or procedures will include, or reference, their method of prioritizing corrective actions consistent with *RCRA 9003(h)(3)*. The states should then implement this prioritization method by providing a higher level of effort to those sites that pose the highest risks. States may continue to take action on lower priority cleanups by responsible parties or the state using LUST Trust Funds. In fact, EPA expects states to continue providing oversight to those facilities willing to take corrective actions on their own, regardless of their priority.

[Note: The *OIG Report* did not take exception to any of the State's priority or risk-based systems, except California's. According to the *OIG Report*, the reason for this exception was due to the inadequacy of the California priority system to identify the most serious LUST sites in terms of risk.]

(4)

ELIGIBLE ACTIVITIES:
o Corrective action
o Enforcement
o Cost recovery
o Exposure Assessment
o Alternate water
o Relocation expense
o Administrative

Allowable Costs. Allowable costs are the costs of eligible activities as described in the *LUST Trust Fund Guidelines.* Allowable costs must also meet the requirements of the grant regulations at *40 CFR Part 31.* State cost recovery programs are not required to list allowable costs; however, they may choose to list eligible items. Eligible activities are listed here for ease of reference and as a reminder as to what costs are allowable expenditures for LUST Trust Funds. LUST Trust Funds may be spent on the allowable costs for the following eligible activities:

- **corrective action**, including emergency response and initial site hazard mitigation, investigation of suspected releases and source identification up to the time that a release is determined to come from an unregulated source, cleanup of releases, long-term operation and maintenance of corrective action measures, purchase and/or lease of equipment;
- **enforcement**, including development, issuance and oversight of enforcement action directed to responsible owners/operators;
- **cost recovery**, recovery of costs from liable tank owners and operators;
- **exposure assessment**, as defined under *RCRA section 9003(h)(10)*;
- **provision of temporary and permanent alternate water supplies**;
- **relocation of residents;** and
- **administration and planning expenses** reasonable and necessary and directly related to the above activities.

UST *Closures* are not an allowable LUST Trust Fund cost; however, UST *Removals* may be allowable if required for the cleanup.

Allowable costs are limited to actions in response to an existing or suspected release from petroleum USTs. An inspection conducted as part of a routine random inspection scheme would not be an allowable cost, but an inspection as a result of a reported release would be allowable. UST closures are not an allowable cost. However, UST removal may be an allowable cost if the corrective action at a specific site requires the removal of an UST as part of the cleanup. For example, a site that requires removal of contaminated soil for the required cleanup will necessitate the removal of the tank as part of the corrective action. However, a site for which natural attenuation is the selected corrective action, may not necessitate the removal of the tank as part of the cleanup. In this latter case, it may be necessary to remove the tank as part of source control which is an allowable LUST Trust Fund cost [John, is this correct?]. Site files should be carefully documented for all UST removals undertaken with LUST Trust Funds.

Additionally, LUST Trust Fund monies may only be used for addressing actual or suspected petroleum releases from USTs subject to Subtitle I jurisdiction. Once an initial investigation reveals the UST is not a statutorily regulated UST, LUST Trust Funds may no longer be used for any of the activities listed above for these USTs.

Site-specific Accounting Thresholds:
- ***Emergency response***
- ***Detailed site investigation***
- ***[illegible]***

States *must* track site-specific costs regardless of whether they intend to pursue recovery.

(5) Recoverable Costs. The *LUST Cost Recovery Policy* states that, “Owners and operators are liable for all costs of corrective action and

enforcement, including interest, indirect and ‘management and support’ costs associated with these activities and paid for with LUST Trust Funds.” All LUST Trust Funds are recoverable and must have some level of tracking. There are basically three levels of tracking and accounting: (1) grants management tracking consistent with *40 CFR Part 31*; (2) LUST Trust Fund tracking by the three categories 7-general support and management, E-site cleanup actions, and 4-enforcement; and, (3) site-specific tracking.

All LUST Trust Fund expenditures are required to be tracked by the first two levels. Site-specific tracking is only required after one of the thresholds has been met. The site-specific thresholds are triggered when: an emergency response is initiated by the state or its contractors; a detailed site investigation is initiated by the state or its contractors; or the state has determined the owner or operator is or is likely to be recalcitrant (i.e

., solvent owner or operator who refuses to comply with corrective action orders). For more on the three thresholds see Section C - Accounting and Record-keeping. The state

must track recoverable site-specific costs regardless of whether they intend to pursue cost recovery (see *1994 OUST memorandum* and *1996 Region 4 letter*).

States *must* assess interest in accordance with *LUST Cost Recovery Policy.*

State will assess interest on recoverable costs in accordance with the *LUST Cost Recovery Policy*, pages 10-11. However, the state has discretion in whether or not to collect the interest assessed.

A state cost recovery policy or procedures that do not require the tracking of recoverable costs will be deemed insufficient.

At a minimum, states *must* contact O/O, notify them of their liability, and demand payment.

(6) Minimum Recovery Effort. The written state cost recovery policy or procedures should describe the level of effort the state will use in pursuing recoverable costs for various situations. The state has considerable discretion in determining which of the tracked costs they will actually pursue during a cost recovery. A**t a minimum**, for all sites that meet a threshold for site-specific tracking, states should make reasonable efforts to contact owners and operators liable for a release, notify them of their liability for enforcement and corrective action, and demand payment *(LUST Cost Recovery Policy, page 5)*.

A demand letter is not required when:
- O/O is unknown
- O/O is insolvent but maintained financial assurance

According to the *1994 OUST memorandum*, there are at least two situations when the demand for payment may not be required for a site that met a site-specific accounting threshold. A demand letter is not required when: (1) the owner or operator are unknown; or (2) the owner and operator are financially unable to carry out corrective action and a formal determination of insolvency is made. In the case of the unknown owner or operator, the state must have made (and documented) a reasonable search for the owner or operator. A reasonable search should include a review of real estate records and/or performing a reasonable assessment to identify the source of the release. In the case of the financially unable owner and operator, if they **did not** maintain the required level of financial assurance, the state cannot consider the solvency of an owner or operator, and must issue a demand letter.

For owners and operators that are financially unable, a demand for payment may not be required in the case of an owner or operator that has filed for bankruptcy. States should examine their state laws concerning bankruptcy and determine the appropriate action. In some cases claims must be made against a company that has filed for bankruptcy, so that when company assets are distributed, the cost recovery claim may receive its share of any distribution of assets. In other cases, no claims may be filed. The state should continue to review bankruptcy cases from time to time. In cases where the owner or operator becomes solvent again, a demand letter must be issued. The statute of limitation may be a limiting factor in such cases.

Region 4 will not generally accept policies that set an arbitrary minimum amount below which cost recovery will not be pursued.

Region 4 will not generally accept a state policy that sets an arbitrary minimum amount below which the state will not pursue cost recovery. States are advised not to establish arbitrary floor levels for cost recovery. Rather, cost recovery activities should result from the consistent application of standard procedures. Specific decisions regarding the amount of funds the state will seek to recover through legal action are appropriately made on a site-specific basis.

States may not compromise or terminate a cost recovery based on *solvency* if an O/O did not maintain the required level of financial assurance.

(7) Recovery Where Financial Responsibility Was Not Maintained. As described briefly above, one area in which the state does not have discretion in issuing a demand letter and pursuing cost recovery is the case of an owner or operator that has failed to maintain the required level of financial assurance. For these cases, the state is not allowed to compromise or terminate the cost recovery claim based on the solvency of the owner or operator according to the *LUST Cost Recovery Policy* and the *LUST Trust Fund Guidelines*. Recent guidance indicates that failure to maintain the required financial assurances does not preclude the state from considering other factors in determining the extent to which they will pursue a cost recovery action (see *1997 OUST memorandum)*. The

LUST Cost Recovery Policy states the level of recovery effort should be based on a weigh in of the resources necessary to recover the claim against the amount that may be recovered and the prospects for recovery. Thus, although the solvency of the responsible owner or operator may not serve as the basis for compromising or terminating a cost recovery claim, the policy allows states to consider other factors such as the cost of the cleanup, the likelihood of recovery, the deterrent value of the case and the opportunity costs.

It should also be noted that phased-in compliance dates for financial responsibility affect the determination of when the owner or operator is required to have a financial assurance mechanism. For example, assume there is a facility that had a release on December 30, 1993. The owner of this facility owns less than 13 USTs. According to the regulation, 40 C.F.R. § 280.91, the owner or operator was not required to have financial assurance at the time of the release. The owner was not required to have financial assurance until December 31, 1993. Therefore, the solvency of this owner **can** be considered in determining which costs, if any, to recover.

States should set priorities for cost recovery actions.

(8) Priorities for cost recovery actions. According to the *LUST Cost Recovery Policy*, pages 12-13, states should have, or should develop, systems to set priorities for cost recovery cases. If the state has a system for setting cost recovery priorities it should be included or referenced in the written policy or

procedures. Although not specifically required, a priority system is strongly encouraged. A priority system will allow states to devote the greatest effort to those cost recovery cases deemed the highest priority such as recalcitrant owners that are financially able to pay. See pages 12-13 of the *LUST Trust Fund Policy* for more information on what should be included.

C. Recovery Procedures

States may choose to provide written cost recovery procedures in lieu of a policy or in addition to a policy. Variations in state recovery procedures can be expected, but generally states will be responsible for the following activities in cases they deem to be high priorities.

- o Determination of a release
- o Notification of responsibility to the owner and operator
- o Negotiation for corrective action (in non-emergency situations)
- o Cleanup (if the owner or operator is incapable or unwilling o clean up)
- o Demand for payment
- o Negotiation for a settlement of the recovery claim
- o Litigation (when demand for payment and efforts to reach an administrative settlement fail)
- o Collection and case closure

States should have written procedures in place to address each of these activities although not necessarily in the format provided. Case files should include the documentation to support these activities. The following information should be considered in developing recovery procedures:

At the time the State determines a release requires LUST Trust Funds for emergency response, site-specific accounting must begin.

(1) Determination of release. The state should have a consistent procedure to confirm there has been a release at a specific site and that the release is from a Subtitle I regulated UST. The state may choose to clarify when a release response is determined to be an emergency response (because site-specific accounting begins with this determination). Emergency response actions could include such items as mitigating fire, explosion, or hazardous vapor, providing alternate water supply, etc. The state may choose to add a section that describes emergency response actions and include it in the written cost recovery policy.

"EPA does encourage states to identify responsible parties...when the state believes the effort would represent efficient use of Trust Fund monies." (1994 OUST Memo)

(2) Notification of responsibility to the owner or operator. The state should consider the process to locate and inform the owner and operator where there is a confirmed release from their USTs that requires an additional level of corrective action. For example, this could be a standard letter the state issues to notify the owner and operator of the confirmed release and their responsibilities under the law. The state should establish a process to locate the owner and operator when it is not immediately evident. For example, title searches, hydrologic studies, chemical analysis, enforcement, etc., may be required to determine the responsible owner and operator. It is important for the state to decide when the search for the owner and operator will be deemed a diligent search and the site will become an abandoned site. The main criteria for determining what constitute a diligent search is

reasonableness, i.e., was a reasonable effort made to locate the responsible owner and operator based on the expected financial return or deterrent power of the case. The *1994 Oust memorandum* states, “EPA does encourage states to identify responsible parties...when the state believes the effort would represent efficient use of Trust Fund monies.”

At the time the state determines an owner or operator is recalcitrant, site-specific accounting must begin.

(3) Negotiation for corrective action. The state should have a process for negotiating with the owner and operator to encourage them to perform the corrective action required. The state could have standard letters, meetings, financial information questionnaires, a flow-chart, etc. At the outcome of this process, the state should be able to determine and describe if the owner or operator are financially able and recalcitrant, or not financially able to pay for corrective action. At the time the owner or operator are determined to be recalcitrant, site-specific accounting is required, and enforcement activities may be necessary. A determination of the enforcement activities that may be necessary to encourage a recalcitrant owner or operator to comply with the requirements should be made (i.e., issuance of corrective action orders, extended negotiations, administrative orders, etc.). Costs for enforcement activities are recoverable and must be tracked by site-specific accounting for recalcitrant owners and operators.

The state may wish to establish criteria for evaluating financial statements to determine when the owner and operator are financially unable to pay. Keep in mind that while ability to pay may be the reason to initiate LUST Trust Fund corrective action, it cannot be used to justify forgoing cost recovery in the case of owners or operators that did not maintain the required level of financial responsibility at the time of the release.

Once it is determined the owner or operator will be taking the lead on the corrective action, the site is no longer a LUST Trust Fund corrective action site, although LUST Trust Funds spent prior to the determination are recoverable. The state should decide how the information gathered to date is transferred to the appropriate state program for handling, including documenting the decisions and case closure for the LUST Trust funded portion of the case.

(4) Corrective action. The state should have a process for corrective action once the state assumes the lead for corrective action. It may be the same process that is followed by state funded corrective action. At a minimum, the state may wish to describe when a "detailed site investigation" is initiated since this is another trigger to begin site-specific accounting.

States are advised not to use arbitrary minimum amounts as a basis for determining which cost recoveries to pursue.

(5) Demand for payment. The *LUST Cost Recovery Policy* requires, **at a minimum**, a search for the owner and operator, and

a demand for payment if the owner or operator is located. The state should have a process to demand payment for LUST Trust Fund recoverable costs. It may include the circumstances under which a demand for payment will not be issued (i.e., abandoned sites). In no case will it be deemed acceptable for a state to have an arbitrary amount below which it will not issue a demand for payment. An evaluation of when to pursue a cost recovery action shall be made after the demand for payment and on a site-by-site basis. For instance, it may not be cost-effective to pursue a cost recovery for a small amount after an initial demand for payment has been issued.

(6) Negotiation for a settlement of the recovery claim. The state should have provisions for claim settlement, i.e., what criteria the state may have which allows claim reduction or termination, what criteria the state uses to determine if the claim should be negotiated (see pages 12-13 of the *Cost Recovery Guidance* and the *1996 OUST Memorandum*). The provisions should include the type of documentation that is required for the file, i.e., financial statements, title searches, etc.

It is important to remember there is one area where the state does not have the discretion to negotiate settlement based on solvency. That case is when the owner or operator did not maintain the required financial responsibility, regardless of ability to pay. Under the *Cost Recovery Policy* and *LUST Trust Fund Guidance*, the state must seek full cost recovery when the owner or operator did not maintain financial responsibility as required, unless factors other than solvency are used to compromise or terminate the claim.

(7) Litigation. When demand for payment and negotiations fail, or when the site cannot be negotiated due to the owner or operator failure to maintain financial responsibility, litigation may be pursued. EPA recognizes the state will not pursue all cases that fall into this category due to cost restraints. The state should describe how they determine which cases to pursue through litigation. As a minimum, this should include those cases where the owner or operator has not maintained the required financial responsibility and factors for compromising or terminating the recovery do not exist. This should include how the state ensures the information collected and recorded in the case file is up-to-date, accurate, and supportable. The *Attorney's Workgroup Guidance* may be helpful in this area.

According to the *Cost Recovery Policy,* page 4, the state should notify EPA's Office of Regional Counsel within one week of filing judicial recovery actions for sites where they have used LUST Trust Fund money for cleanup or enforcement. For Region 4 the person to notify is:

Mr. Kevin Smith
Associate Regional Counsel
Environmental Accountability Division
U. S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

(8) Collection and Case Closure. The state should have provisions for collecting cost recovery dollars and closing out cases. See the following sections on Accounting and Record-keeping and Documentation of Site-specific Decisions. The pertinent information to be included in case closures would include: documentation of LUST Trust Fund expenditures; site-specific information (e.g., owner/operator, location, reports, etc.); explanation of why a cost recovery was not pursued, why only partial costs were recovered, or, why litigation was not pursued.

D. Accounting and Record-keeping

All LUST Trust Funds *must* be tracked by activity codes:
7-general support
E-site cleanup
4-enforcement

The state must describe its tracking, accounting, and record-keeping capabilities. The description should provide enough detail for Region 4 to understand the state capability to carry out LUST Trust Fund activity accounting under the categories 7, E, and 4, as well as the capability to perform site-specific accounting as required by the *LUST Cost Recovery Policy, LUST Trust Fund Guidelines,* and the *Financial Management Handbook*.

The state must account for **all** LUST Trust Funds that are spent in the three accounting areas: 7 - general support and management, E - site cleanup actions, and 4 -enforcement. Definitions of these three categories are provided in Appendix B of the *Financial Management Handbook*.

States *must* be capable of site-specific accounting for LUST Trust Fund expenditures.

The state should describe its capabilities in documenting site-specific costs. **All** site-specific costs must be documented when one of the three thresholds have been met, regardless of whether the state decides to recover costs on a site. The three thresholds that trigger site-specific accounting are:

- o an emergency response is initiated by the state or its contractors,
- o a detailed site investigation is initiated by the state or its contractors,
- o the state has determined the O/O is or is likely to be recalcitrant (i.e., solvent O/O who refuses to comply with corrective action orders).

Site-specific accounting includes: staff time dedicated to the site (i.e., reviewing contractor reports, site visits, developing site-specific contracts, communications with the O/O or their designated representative), site-specific travel and equipment, site-specific invoices for contract costs, interest on unpaid debt, costs for alternate water supplies, cost of enforcement and litigation, etc.

The state is encouraged to define when each of the three site specific accounting thresholds is met in their Cost Recovery policy or procedures. The state has the discretion, within the cost recovery policy, to make these determinations. *The 1996 OUST Memorandum* clarifies that site-specific accounting is not required for LUST Trust Fund supported staff that oversee responsible party-lead cleanups. However, these costs are recoverable should the state decide to pursue recovery. Emergency responses funded with LUST Trust Funds at these sites prior to the responsible party initiating cleanup, will still require site-specific cost accounting. This point reinforces the importance of clearly understanding when to initiate and stop site-specific accounting.

The state should describe how it tracks and accounts for recovered funds. The state must be able to demonstrate that recovered funds are retained and used for additional eligible activities under the LUST Trust Fund Guidelines.

States *must* be able to demonstrate that recovered funds are retained and used for eligible Trust Fund activities.

The records required to document costs, such as contracts, invoices, time sheets, etc., should be organized and retained. Records should also include information such as owner or operator searches, site location, corrective action plans, enforcement actions (see *Attorney's Workgroup Guidance).* Retention time is a minimum of 3 years after the close-out of the LUST Trust Fund cooperative agreement from which the funds were expended.

E. Documentation of Site Specific Decisions

State's *must* fully document all case decisions and close out all cases.

Describe the process the state will use to document its decisions concerning cost recovery cases. The *OIG Report* identified the need for significant improvement in documenting cost recovery decisions made by the states related to specific sites. It should be stressed that regardless of the action taken by the state in exercising its discretion in cost recovery cases, the state is required to fully document its decisions and to formally close out all cases. The state's decisions need to be consistent with its written cost recovery policy or procedures. Decisions should be documented at the time of the action. The decision document need not be extensive (e.g., a checklist, a standardized memorandum, etc.), but the rationale for the state's decision needs to be clearly presented.

VIII. SUFFICIENCY REVIEW

The principle responsibilities of EPA in cost recovery are to provide funding, policy, guidance, oversight, and assistance to states. The goal will be to help build state capability in developing cost recovery and improving performance with a written policy and procedures.

States *must* submit a written cost recovery program to Region 4's UST Section for review.

All states that receive a LUST Trust Fund cooperative agreement award MUST have a cost recovery program (*1996 OUST Memorandum*). The state's written cost recovery program should be submitted to:

Mr. John Mason, Chief
UST Section
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

The due date is December 31, 1997, unless otherwise specified in your FY1998 state work plan. Once reviewed and approved, the state should implement its written cost recovery program at the earliest possible time. State cost recovery programs should be reviewed and updated as needed.

Region 4 will provide a sufficiency review of the state's written Cost Recovery Program after it is submitted. This review will ensure that the four requirements of the 1996 OUST Memorandum are sufficiently addressed. These four requirements are:

- The state has the authority to recover LUST Trust expenditures,
- The state has a written cost recovery policy or procedures,
- The state has site-specific accounting capability for sites that meet one of the three thresholds, and
- The state has a process in place to document its site-specific decisions.

Should there be any unresolved issues with the EPA sufficiency review, the State and EPA UST Program Managers will initiate informal discussions. If an issue cannot be resolved by informal discussions, OUST will be asked to help resolve the issue.

A checklist in Appendix A will be used to aid Region 4 personnel in determining if the written cost recovery program is sufficient. We have also developed a question/answer section in Appendix B, based on questions that have been asked and the current responses. Appendix B, Questions and Answers, will be updated as needed.

APPENDIX A

REGION 4 CHECKLIST FOR SUFFICIENCY REVIEW OF STATE COST RECOVERY PROGRAMS

REGION 4 CHECKLIST FOR
SUFFICIENCY REVIEW OF
STATE COST RECOVERY PROGRAMS

STATE: ________________________________ SUBMITTAL DATE: ________________

REVIEWERS:___________________________ REVIEW DATE: ___________________

____

ITEM	REQ'D BY:	YES	NO
1. Did the state provide evidence of its authority to pursue cost recovery, i.e., reference to the Attorney General Statement or other documents? (see 1996 OUST Memo)	RCRA 9003(h)(7)		
2. Did the state provide or does EPA have formal documentation of the state’s capability to carry out corrective action and enforcement?	RCRA 9003(h)(7)		
3. Did the state indicate that it will notify Region 4's Attorneys one week prior to filing judicial actions for cost recovery?	OSWER Dir. 9610.10A, p.4		
4. Is the state*s cost recovery program purpose (and overall program) consistent with EPA*s cost recovery program purpose, i.e., to provide compliance incentive and induce cleanup of contaminated sites by O/O ?	OSWER Dir. 9610.10A, p. 1		
5. Does the state have definitions, or reference definitions, that makes their cost recovery guidance clear to all users?	RCRA 9003(h)(9) and(10)		
6. Did the state provide evidence of a written prioritization method for corrective action work in accordance with risk to human health & the environment?	RCRA 9003(h)(3)		
7. Did the state indicate what costs are recoverable, including interest, consistent with OSWER Dir.?	OSWER Dir. 9610.10A, p.8		
8. Did the state indicate it will track site-specific costs when the thresholds are met, regardless of whether it intends to pursue cost recovery?	OUST Memo. Dated 1996		
9. Did the state indicate it will assess interest in accordance with LUST Policy requirements?	OSWER Dir. 9610.10A, p.10-11		

10. Did the state indicate it will make a reasonable effort to locate the O/O and notify them of their liability?	OSWER Dir. 9610.10A, p.5		
11. Did the state indicate it will demand payment from all known and solvent O/Os?	OSWER Dir. 9610.10A, p.5 1994 OUST Memorandum		
12. Did the state indicate it will demand payment from all O/O that did not maintain the required financial responsibility?	OSWER Dir. 9610.10A p.5		
13. Did the state indicate it will **not** compromise or terminate a claim for O/O that did not maintain the required financial responsibility **based on solvency**?	OSWER Dir. 9610.10A, p.5 1997 OUST Memorandum		
14. Did the state set an arbitrary minimum amount below which they will not pursue cost recovery? If yes, indicate the amount.			
15. Did the state describe its capability to document all costs eligible for recovery by the activity codes (4, E, 7)?	OSWER Dir. 9610.10A p.5		
16. Did the state describe its capability to document site-specific costs to the required level of detail? And did the state indicate it is tracking the required site-specific costs?	OSWER Dir. 9610.10A p.14		
17. Did the state describe a method that ensures recovered costs are spent on eligible LUST Trust Fund activities?	OSWER Dir. 9610.10A, p.4		
18. Did the state describe its method for documenting cost recovery decisions and formally close out all cases? (see 1996 OUST memo)	OSWER Dir, 9610.10A, p.6		

For answers that fall into the shaded area, describe why each item does not impact the sufficiency of the state's cost recovery program. Attach more pages if necessary.

Does this cost recovery program meet the minimum requirements:

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APPENDIX B

REGION 4
QUESTIONS AND ANSWERS ON COST RECOVERY

REGION 4
QUESTIONS AND ANSWERS ON COST RECOVERY

Q.1. In light of the OIG*s recent report on the LUST Trust Fund audits, can states be provided written support from OUST to reinforce that the Cost Recovery Policy (OSWER Directive 9610.10A) indeed does give States the discretion to pursue only a portion of the eligible recoverable costs for any site?

A.1. OUST responded to the question in their memorandum dated December 31, 1996. The response is that the OIG did not express concerns with the provisions of EPA's Cost Recovery Policy (see page 2 of the 1996 OUST Memorandum). Rather, the OIG report identified situations where some states had no cost recovery policy, or were not documenting decisions made under their policy. The 1996 OUST memorandum goes on to state that the LUST Cost Recovery Policy provides states with significant flexibility and discretion in determining which cost to pursue in cost recovery actions (see pages 6, 8, 9, 11, and 12 of the LUST Cost Recovery Policy). However, states should be made aware that even with the discretion to choose which costs to pursue, the Cost Recovery Policy still requires States to track all eligible costs and document their decisions when the full costs are not recovered.

Q.2. Is my state's method of prioritizing sites consistent with RCRA section 9003(h)(3) and the OIG audit report which require States to give priority to undertaking corrective action to releases from petroleum UST which pose the greatest threat to human health and the environment?

A.2. Each state will have to be considered separately. In general, a state must first determine if they have a priority system that takes into account the threat posed to human health and the environment for releases from petroleum USTs that qualify for LUST Trust Funds. Threat to human health and the environment is determined by such things as imminent danger, contamination of and threat to water supplies, etc. The priority system should be in a written form available for state staff use.

Next the state should determine if the LUST Trust Fund Program consistently uses the priority system to determine which sites are highest priority (i.e., highest risks). The state should also determine if the high priority sites are being adequately addressed with LUST Trust Funds (i.e., are the risks to human health and the environment being addressed by corrective action and/or enforcement). If so, it is likely the state's method is consistent with the requirements of RCRA section 9003(h)(3) and the OIG Audit Report.

Q.3. What is the status on whether state or federal courts should be used to pursue cost recovery actions? Also, what is the status on the determination on whether the 3-year or 6-year statute of limitation applies? What are the legal citations for the 3- and 6-year limits referenced?

A.3. In a memorandum dated July 1, 1997, OUST indicates that the Office of General Counsel (OGC) has not made a formal decision on this matter. The OUST memorandum goes to say that, “The practice of bringing LUST Trust Fund cost recovery actions in state court has not been questioned by OGC, OECA [Office of Enforcement and Compliance Assurance], or the OIG. Therefore, we see no reason to change this practice at this time, and encourage states to proceed as they have been with any future cases.”

Q.4. How does EPA*s "Policy on Compliance Incentives for Small Businesses," apply to the LUST Trust Fund Cost Recovery Program?

A.4. Region 4 provided copies of this policy to states when it was issue in May 1996 for use in UST enforcement actions. OUST reviewed the policy and found it has no impact on the LUST Trust Fund cost recovery actions (see 1997 OUST memorandum).

Q.5. Do states have the discretion to pursue cost recovery on inherited property, even if the new owner (inherited) did not maintain financial responsibility?

A.5. OUST responded to this question in the 1997 OUST memorandum. OUST indicated because neither RCRA Subtitle I or the LUST Cost Recovery Policy specifically address inheritance, we should assume the that the provisions of the Policy generally remain applicable. This means the specific facts of a case and individual state laws should influence the state’s pursuit of cost recovery involving inherited property. OUST provides the following example scenario:

> ... a common situation would be where a tank owner dies, and his will provides for the property on which the tank is located to be passed on to his heirs. Generally, the executor (trustee, personal representative, etc.) of the estate of a deceased tank owner is responsible for the settlement of claims against the estate and the disposition of all remaining assets to the heirs. As part of the process of administering the estate, all persons with claims against the estate must present them to the court within a specified time period. The state LUST program would file their cost recovery claim at this time in order to establish their standing with the court. Presumably, it would be at the court’s discretion to determine the outcome of the cost recovery claim, including the final dollar amount. The executor would be responsible for satisfying this, as well as other claims, out of the proceeds of the estate. Depending on the decedent’s other assets, the executor may be forced to sell the property on which the tank is located to settle the estate.

Q.6. What constitutes a "diligent search" in locating a responsible party? Also, can the state use LUST Trust Fund monies to contract a person(s) to perform "diligent searches"?

A.6. In keeping with state*s discretion to implement cost recovery with as few limitations as possible, Region 4 expects each state to determine what constitute*s a diligent search for their state. This determination should be included in the state*s written cost recovery program/policy. Region 4 will review the state*s determination when their cost recovery program is submitted for a sufficiency review. If the state's cost recovery program is determined to be sufficient, this means we have looked at the issue of "diligent search" and find the state's method of defining a "diligent search" acceptable. Region 4 will support the state*s discretion to implement their program's accepted determination of what constitutes a "diligent search."

The answer is yes, states may contract this type work with LUST Trust Funds because trying to locate the responsible party through real estate searches is a cost recovery activity. Cost Recovery activities are an allowable cost as listed on page IV-1 of the LUST Trust Fund Guidelines (OSWER Directive 9650.10A). This work should be included in the state*s LUST Trust Fund work plan and grant application. The time spent by the contractor becomes a trackable and recoverable cost. Contracting these services seems like an excellent way to obtain expertise in an area the UST program might not have.

Q.7. How many resources should be expended in an effort to determine the source of petroleum contamination? At what point does the state determine they have expended enough resources and will likely never find the source?

A.7. This is another issue that is left to the state's discretion. However, there are a few items the state should consider when making this determination. These are:

- LUST Trust Funds can only be used to take corrective action on releases from regulated petroleum USTs where: a responsible party cannot be located, a prompt action is required, corrective action costs exceed the coverage required by EPA, or there is a recalcitrant owner/operator.

- LUST Trust Fund Guidelines states that the general categories of activities eligible for LUST Trust Funds include "investigation of suspected leaks and source identification up to the time that a leak is determined to come from an unregulated source."

Therefore, it is important to determine that the release is from a regulated petroleum UST. There are several likely scenarios that could result. The State may determine the release is from a petroleum UST, but still may not be able to locate the specific source from which the release occurred. For example, there may be a release that occurred in area where two gasoline stations are adjacent to one another. If both stations are abandoned, or not financially able, it may be

appropriate to suspend the search for the source and concentrate on corrective action. However, if one or both stations are financially viable, the corrective action is expensive (i.e., the amount to recover is large), and there is a way to differentiate the petroleum from each source, the state may want to provide additional resources to determine the exact source, since the owner could then be subject to cost recovery.

Another scenario may occur when the state has determined the source is a petroleum product, but cannot link it to regulated USTs. For example, a release occurs in an area with petroleum USTs, an unregulated heating oil tank, and an AST. In this case, further analysis of the site and product may be needed to determine if the source is a regulated UST. Until the state connects the release to a regulated petroleum UST(s), it may be prudent to continue the search for the source.

In all cases the State should document their reasons for suspending the search. EPA guidance indicates that states are encouraged to identify responsible parties when the state believes the effort would represent efficient use of Trust Fund monies. Therefore, the search effort may be minimal when minimal funds have been spent because the effort to recover the funds may exceed the amount to be recovered. Documentation of the decision is important in these instances.

Q.8. Is EPA going to require any reporting on cost recovery?

A.8. At this time, OUST is not pursuing any additional national reporting measures that include cost recovery. The reporting measures were recently revised. The old reporting measure for cost recovery was eliminated during this revision. Region 4 does not anticipate any routine cost recovery reporting either. In the event Region 4 requests a special report on cost recovery, we will consider North Carolina*s concern for reporting on items that make sense.

Q.9. ***Can UST closures be paid for with LUST Trust Funds?***

A.9. UST closures are not generally considered an eligible activity for the LUST Trust Fund. However, in the case where tanks must be removed from a contaminated site as part of the corrective action work, tank removal would be an allowable expense. The case file should be carefully documented to establish the tank removal was required to complete the required corrective action work.

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